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IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SAN DIEGO
DEPARTMENT NO. 5 HON. PAUL EUGENE OVERTON, JUDGE

GREMLIN INDUSTRIES,

PLAINTIFF,

VS.

CIRCLE INTERNATIONAL CO., INC.

DEFENDANT.

NO. 416704

MOTION FOR CHANGE
OF VENUE

~~F~~ L E E D
Robert D. Zumwalt, Clerk

SEP 22 1978

BY E. AMUNDSEN, Deputy

REPORTER'S TRANSCRIPT

SAN DIEGO, CALIFORNIA

AUGUST 24, 1978

APPEARANCES:

FOR PLAINTIFF:

RICHARD R. FREELAND, ESQ.

FOR DEFENDANT:

RICHARD J. GREENE, ESQ.

NEIL R. TABACHKI, CSR
LICENSE NO. 3494

1 SAN DIEGO, CALIFORNIA, THURSDAY, AUGUST 24, 1978, 1:30 P.M.

2 THE COURT: BECAUSE I BELIEVE COUNSEL, AND PROBABLY
3 WILL HOLD THEM TO THEIR TIME ESTIMATE, WE'LL TAKE NO. 16.

4 MR. GREENE: GOOD AFTERNOON, YOUR HONOR, RICHARD
5 GREENE OF KIRSCH, ARAK AND BULMASH FOR THE DEFENDANT
6 AND MOVING PARTY.

7 MR. FREELAND: DICK FREELAND FROM ASARO AND KEAGY,
8 RESPONDING PARTY, GREMLIN.

9 THE COURT: I HAVE READ THE COMPLAINT MR. BORUNDA
10 FILED, THE POINTS AND AUTHORITIES IN OPPOSITION TO THE
11 MOTION FOR CHANGE OF VENUE, THE MOTION FOR CHANGE OF
12 VENUE, THE DOCUMENTS TO EACH. I'M NOT SURE THAT I
13 UNDERSTAND THEM ALL. I PARTICULARLY NOTED THE WELCOME
14 AND SEASON GREETINGS PART AND UNDERSTAND THAT YOU CAN
15 PRESENT YOUR CASE IN THREE TO FIVE MINUTES.

16 MR. GREENE: THAT'S CORRECT, YOUR HONOR. ASIDE
17 FROM WHAT I'VE PLACED IN MY POINTS AND AUTHORITIES,
18 I'D LIKE TO MAKE SOME COMMENTS ON THE OPPOSITION.
19 SPECIFICALLY, FIRST, GOING TO THE DECLARATION OF
20 MR. FOGLEMAN IN OPPOSITION TO THE MOTION.

21 I THINK THERE IS SOME MATTERS IN MR. FOGLEMAN'S
22 DEPOSITION WHICH QUESTION ITS CREDIBILITY ON ITS FACE.
23 MR. FOGLEMAN IN HIS DEPOSITION IS CONTENDING THAT
24 PURSUANT TO A DISTRIBUTORSHIP ORAL AGREEMENT FROM
25 APRIL OF 1973 THAT GOODS WERE ORDERED FOUR TO FIVE
26 YEARS LATER, 1977 AND 1978. IN OTHER WORDS, MR. FOGLEMAN

1 WOULD HAVE THE COURT TO BELIEVE THAT A CONVERSATION OF
2 1973 WAS GOING TO CONTROL THE TERMS OF ORDER, PRICE,
3 OFFER TO SELL, ACCEPTANCE TO PURCHASE, DELIVERY, SHIPPING,
4 TO TAKE PLACE FIVE YEARS LATER. I DON'T THINK THAT'S
5 A REALISTIC PROPOSITION.

6 FURTHERMORE, MR. FOGLEMAN IN HIS OWN DEPOSITION
7 AS WELL AS ALL THE OTHER OFFICERS OF THE CORPORATION
8 TESTIFIED THAT WITH REGARD TO CIRCLE INTERNATIONAL
9 BEING A DISTRIBUTOR, THEY DEFINE THAT LITERALLY THAT
10 ANYONE THAT SELLS FOR THEM BECAUSE THEY DON'T SELL TO
11 THE ULTIMATE CONSUMER OR TO THE DIRECT PUBLIC, THEY
12 ONLY SELL TO WHOLESALERS. WHEN QUESTIONED ABOUT A
13 WRITTEN LETTER SIGNED BY MR. HANSOM AND MR. FOGLEMAN
14 AND MR. CANDELORE AND MR. FOSTER, ALL THE OFFICERS OF
15 GREMLIN TESTIFIED IN COMPLETE ACCORD THAT THIS SUPPOSED
16 1973 DISTRIBUTORSHIP WAS SLIGHTLY DISTRIBUTABLE IN
17 THAT CIRCLE INTERNATIONAL WAS GOING TO RECEIVE A
18 COMMISSION RATHER THAN BEING A MERE SELLER OF PRODUCTS,
19 NEVER TOOK EFFECT BECAUSE OF AN ORAL REQUEST FROM
20 MR. MC MURDIE, WHO IS THE PRESIDENT OF DEFENDANT CIRCLE
21 INTERNATIONAL CORPORATION.

22 FURTHERMORE, MR. FOGLEMAN'S DECLARATION IN OPPOSITION
23 ON PAGE 4 CONTENDS THAT WITH REGARD TO THE CASH
24 ON DELIVERY ORDERS WHERE PAYMENTS UNQUESTIONABLY WAS
25 IN LOS ANGELES THAT THIS WAS INSTITUTED ON AND AFTER
26 DECEMBER OF 1977, YET THE PLAINTIFF CORPORATION'S OWN

1 RECORDS INDICATE CASH ON DELIVERY INVOICES BEGINNING
2 AS EARLY AS OCTOBER 7TH OF 1977, BEING INVOICE NO.
3 18557B-1, AND CONTINUING FOR A TWO-MONTH PERIOD PRIOR
4 TO DECEMBER OF 1977. CASH ON DELIVERY ORDERS ALONE
5 WHERE PAYMENT WAS CLEARLY TO BE MADE IN FULL, INCLUDING
6 NOT ONLY THE PURCHASE PRICE BUT THE FREIGHT CHARGES
7 AS WELL, TO BE MADE IN LOS ANGELES COUNTY COMPRISE,
8 BY MY ACCOUNT, APPROXIMATELY HALF OF THE AMOUNT IN
9 DISPUTE.

10 ALSO THE POINTS AND AUTHORITIES IN OPPOSITION TO
11 MY MOTION MISQUOTES THE DEFENDANT'S POSITION BECAUSE
12 ON --

13 THE COURT: ARE YOU TALKING ABOUT THE INVOICE
14 NO. 18? I THOUGHT THEY ALL HAD 19 AND 20.

15 MR. GREENE: THERE ARE SOME -- I'M SORRY, YOUR
16 HONOR, I MADE A MISTAKE, THAT ONE, OCTOBER 7TH INVOICE,
17 THAT I REFER TO IS NOT PART OF THE AMOUNT SUED FOR.
18 I APOLOGIZE TO THE COURT. THERE ARE OTHER INVOICES
19 WITH 18 AND 19 PREFIX AS THE FIRST TWO NUMBERS WHICH
20 ARE PREVIOUS IN DATE TO DECEMBER 1977 AND IN WHICH ARE
21 ON A STATEMENT TO THE ACCOUNT ATTACHED AS AN EXHIBIT.
22 I BELIEVE INVOICE 18986 OF NOVEMBER 1 IS AN EXAMPLE
23 WHAT THE COURT WOULD FIND INCLUDED ON THE STATEMENT OF
24 ACCOUNTS.

25 NOW, THE POINTS AND AUTHORITIES IN OPPOSITION
26 WOULD HAVE THE COURT TO BELIEVE THAT WE'RE CONTENDING

1 BECAUSE FREIGHT CHARGES WERE PAYABLE IN LOS ANGELES,
2 THAT THIS CONSTITUTES PERFORMANCE IN LOS ANGELES. THIS
3 IS INCORRECT BECAUSE IT MISQUOTES OUR POINTS AND
4 AUTHORITIES IN SUPPORT OF THE MOTION. WE CONTEND THAT
5 NOT ONLY WERE FREIGHT CHARGES PAYABLE IN LOS ANGELES
6 BUT LOS ANGELES WAS THE PLACE OF ACCEPTANCE OF THE GOODS;
7 AND WE SET FORTH AS AN EXAMPLE OF THAT THE EXHIBIT TO
8 MR. MC MURDIE'S DECLARATION BEING THE CIRCLE INTERNATIONAL
9 RECEIVING DOCUMENT WHICH SAID THAT ALL GOODS ARE SUBJECT
10 TO REDUCTION FOR BROKEN OR MISSING PARTS. NOW, THAT,
11 AS MR. MC MURDIE TESTIFIED IN HIS DECLARATION, SIMPLY
12 MEANS THAT THE INSPECTION OF THE GOODS AND THE VERIFICA-
13 TION THAT THEY ARE AS ORDERED IS PRECONDITIONED TO
14 ACCEPTANCE AS THE PRICE THAT THE GOODS ARE INVOICED FOR
15 AND THAT TAKES PLACE BY THE DEFENDANT'S ACTS IN LOS
16 ANGELES.

17 WE CONTEND THAT THIS IS WHAT CONSTITUTES ACCEPTANCE
18 AND THAT THE GEOGRAPHIC LOCATION OF THIS ACCEPTANCE IS
19 IN LOS ANGELES COUNTY, THUS, INDICATING THAT LOS ANGELES
20 BE APPROPRIATE LOCATION FOR VENUE. THANK YOU.

21 THE COURT: MR. FREELAND.

22 MR. FREELAND: JUST VERY BRIEFLY.

23 IT IS PERFECTLY PLAUSIBLE TO ME THAT AN ORAL
24 AGREEMENT CAN BE MADE IN 1973 AND STILL BE IN FORCE AND
25 STILL BE ACTIVE IN 1978. I THINK IT'S DONE ON A REGULAR
26 BASIS IN A NORMAL COURSE OF BUSINESS.

1 I ASSUME WHEN COUNSEL'S TALKING ABOUT THE ACCEPTANCE
2 OF GOODS IN L.A. HE IS TALKING ABOUT THE C.O.D. INVOICES.
3 APPROXIMATELY, BY HIS ACCOUNT, HALF WERE C.O.D. AND
4 HALF F.O.B. I'M NOT SURE WHETHER THAT CARRIES ANY
5 GREAT WEIGHT HERE. IT WOULD SEEM TO ME THE F.O.B. IS
6 WHERE IT STARTED, THE F.O.B. INVOICES, AND THAT WOULD
7 CLEARLY INDICATE THAT THE LAST ACT TO BE PERFORMED BY
8 THE PLAINTIFF WAS IN SAN DIEGO. I THINK VENUE IS PROPER.
9 I THINK IT'S SOMETHING THAT THE COURT CAN'T LIGHTLY
10 OVERRULE, THE PLAINTIFF'S CHOICE OF VENUE. I FEEL THAT
11 SAN DIEGO IS THE PROPER PLACE.

12 THE COURT: GENTLEMEN, I HAVE REVIEWED THE PLEADINGS.
13 I SENSE THE PROBLEM. I EVEN WENT TO THE U.C.C. AND LOOKED
14 UP A COUPLE OF THINGS. I NOTE THAT THE MOTION IS ALSO
15 GROUNDED ON THE POINT THAT THE DEFENDANT'S PRINCIPAL
16 PLACE OF BUSINESS IS LOS ANGELES, DEFENDANT IS PRIMARILY
17 A LOS ANGELES CORPORATION. I DON'T MEAN ANYTHING
18 NARROW BY SAYING IT THAT WAY, COUNSEL.

19 BASED UPON BALANCE AND MY REVIEW OF THE PLEADINGS
20 AND THE MATTERS IN WHICH I INTERPRET THEM, I BELIEVE
21 THAT THE VENUE IN SAN DIEGO COUNTY IS APPROPRIATE IN
22 THIS PARTICULAR CASE AND WILL ACCORDINGLY DENY THE
23 MOTION. THANK YOU VERY MUCH.

24 MR. GREENE: THANK YOU, YOUR HONOR.

25 MR. FREELAND: NOTICE WAIVED?

26 MR. GREENE: YES.

1 DID YOU MAKE A RULING ON THE ATTORNEYS' FEES?

2 MR. FREELAND: WE'LL WITHDRAW THE REQUEST.

3 THE COURT: YOU LOSE, YOU DON'T GO.

4 MR. FREELAND: I THOUGHT THE STATUTE SAID

5 PREVAILING PARTY WOULD --

6 THE COURT: IT'S A CLOSE QUESTION. AS A MATTER
7 OF FACT, I'M GOING TO LEVEL WITH YOU. THE FIRST TIME
8 I READ IT I WAS GOING TO GRANT THE MOTION. I READ IT
9 MORE CLEARLY AND DID SOME INDEPENDENT RESEARCH AND
10 STILL WAS A CLOSE QUESTION. MY CALL IS TO DENY AND
11 I WOULDN'T ORDER EITHER ONE OF YOU ATTORNEYS' FEES
12 WHEN YOU GOT ME THAT MUCH OF A RAZOR'S EDGE.

13 MR. FREELAND: THANK YOU, YOUR HONOR.

14 MR. GREENE: IF I MAY MAKE TWO POINTS. WE WERE
15 REQUESTED BY THE CLERK OF THE COURT AND DID POST TRANSFER
16 FEES EVEN THOUGH THE MOTION HADN'T BEEN HEARD. IF
17 MINUTES COULD REFLECT THAT THEY OUGHT TO BE RETURNED.

18 THE COURT: THERE IS A GAL DOWN AT THE BUSINESS
19 OFFICE AND I THINK THE FORM IS A FORM 280 -- IS THAT
20 STILL THE RIGHT FORM?

21 MR. FREELAND: I DON'T KNOW THE NAME OF IT. I
22 CAN REFER TO HIM.

23 THE COURT: YOU'LL PROBABLY BE AROUND FOR A LITTLE
24 WHILE, WHY DON'T YOU PICK UP THE FORM AND FILL IT OUT
25 AND PROCESS IT THROUGH THIS DEPARTMENT.

26 MR. GREENE: THANK YOU, YOUR HONOR. ONE OTHER

1 MATTER, AND NO WAY INTENDED TO INDICATE ANY DISRESPECT
2 TO THE COURT. THE DEFENDANT RESPECTFULLY DISAGREES
3 WITH THE COURT'S RULING.

4 THE COURT: THAT ALWAYS HAPPENS AT LEAST ONCE AND
5 SOMETIMES FIVE OUT OF EVERY FIVE APPEARING PEOPLE.

6 MR. GREENE: I UNDERSTAND THAT, YOUR HONOR. WE
7 WOULD LIKE TO GET A SECOND LOOK AT IT AND THEREFORE,
8 UNDER C.C.P. 904.2, TO APPEAL. I DO HAVE A PROBLEM IN
9 THAT THE COURT'S RECORD IS INCOMPLETE BECAUSE THE
10 DEPOSITIONS WHICH I REFERRED TO --

11 THE COURT: -- ARE NOT IN THE FILE.

12 MR. GREENE: THEY'RE NOT IN THE FILE. I UNDERSTAND
13 THAT MR. FREELAND'S OFFICE IS WORKING ON GETTING THEM
14 FINISHED UP WITH THE BLANKS FILLED IN. IF DEFENDANT --
15 DEFENDANT ALSO HAS NOT ANSWERED THE COMPLAINT AT THIS
16 STAGE AND I WOULD NOT LIKE TO BE REQUIRED TO ANSWER
17 UNTIL THE VENUE QUESTION IS CLEARED UP. THE COURT'S
18 ORDER COULD, IN EFFECT, GIVE US A STAY ON OUR ANSWER
19 UNTIL THE DEPOSITIONS ARE FILED AND WE CAN GET THE
20 RECORD.

21 THE COURT: HOW MUCH TIME IS GOING TO BE INVOLVED?
22 I'LL GIVE YOU A STAY TO A DATE CERTAIN.

23 MR. FREELAND: WE INTEND TO HAVE -- WE EXPECTED
24 TO HAVE THE DEPOSITIONS FILED THIS WEEK. I FRANKLY
25 DON'T KNOW WHAT THE DELAY IS. I WOULD EXPECT THEM TO
26 BE FILED NO LATER THAN THE END OF NEXT WEEK.

1 THE COURT: I'LL TELL YOU WHAT WE'LL DO: I'LL
2 GIVE TO AND INCLUDING OCTOBER THE -- THAT'S FRIDAY THE
3 13TH, HOW ABOUT THAT -- OCTOBER THE 13TH, 1978 IN WHICH
4 TO RESPOND OR OTHERWISE PLEAD.

5 MR. FREELAND: YOUR HONOR, BASED ON WHAT I JUST
6 HEARD I THINK IT MIGHT BE ADVISABLE THAT NOTICE NOT BE
7 WAIVED.

8 THE COURT: WHY DON'T YOU PREPARE THE ORDER?

9 MR. FREELAND: OKAY.

10 MR. GREENE: THANK YOU, YOUR HONOR.

11 THE COURT: GENTLEMEN.

12 (ADJOURNMENT.)

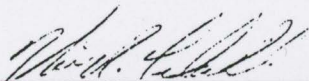
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3 STATE OF CALIFORNIA)
4 COUNTY OF SAN DIEGO)

5
6 I, NEIL R. TABACHKI, CERTIFIED SHORTHAND REPORTER, AN
7 OFFICIAL REPORTER OF THE SUPERIOR COURT, COUNTY OF SAN DIEGO,
8 STATE OF CALIFORNIA, DO HEREBY CERTIFY:

9
10 THAT I REPORTED IN SHORTHAND THE PROCEEDINGS HAD AND
11 TESTIMONY ADDUCED AT THE HEARING HELD IN THE FOREGOING MATTER
12 ON THE 24TH DAY OF AUGUST, 1978; THAT MY NOTES WERE LATER
13 TRANSCRIBED INTO TYPEWRITING UNDER MY DIRECTION, AND THE
14 FOREGOING 8 PAGES CONTAIN A CORRECT STATEMENT OF THE TESTIMONY
15 AND PROCEEDINGS.

16
17 DATED THIS Ten DAY OF SEPTEMBER, 1978.

18
19
20 

21 NEIL R. TABACHKI
22 OFFICIAL REPORTER
23 CSR NO. 3494
24
25
26